Petition

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CASE NO.

in the Supreme Court of the United States

STEVEN DONALD ALANDER,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

POINT I

WHETHER FLORIDA STATUTE 893.135 VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A. WHETHER SECTION 893.135(3), FLORIDA STATUTES, IMPOSES A PENALTY FOR THE EXERCISE OF THE RIGHT TO SILENCE AND, THEREFORE, VIOLATES THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

B. WHETHER SECTION 893.135(3), FLORIDA STATUTES, COERCES SELF–INCRIMINATION WITHOUT GRANTING IMMUNITY AND, THEREFORE, VIOLATES THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

C. WHETHER THE MANDATORY SENTENCING SCHEME UNDER SECTION 893.135, FLORIDA STATUTES, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND THUS VIOLATES THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

D. WHETHER THE ESSENTIAL TERMS OF SECTION 893.135(3), FLORIDA STATUTES, ARE SO VAGUE AND SUBJECTIVE THAT THEY FAIL TO PROVIDE DUE PROCESS OF LAW, AND, THEREFORE, VIOLATE THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

E. WHETHER SECTION 893.135(3), FLORIDA STATUTES, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

F. WHETHER SECTION 893.135(3), FLORIDA STATUTES, VIOLATES THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

G. WHETHER THE FAILURE OF FLORIDA STATUTE 893.135 TO PROVIDE A MAXIMUM SENTENCE MAKES THE STATUTE SO VAGUE AS TO BE VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

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WHETHER THE STOPPING OF PETITIONER'S MOTOR VEHICLE WITHOUT PROBABLE CAUSE OR REASONABLE SUSPICION TO BELIEVE THAT A CRIME HAD BEEN COMMITTED VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

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OPINIONS BELOW

The opinion of the Second District Court of Appeal of Florida has not been reported in the official reporter. (A copy of the opinion is included in the Appendix to this petition as App. 4).

JURISDICTIONAL STATEMENT

On May 13, 1981, the Second District Court of Appeal issued its opinion affirming the judgment and convictions in this cause (App. 4). On July 8, 1981, the Second District Court of Appeal entered an order denying Petitioner's Petition for Rehearing and Motion for Rehearing *En Banc.* (App. 5 to 12). The mandate issued on July 24, 1981 (App. 13).

This Court has jurisdiction to review this case pursuant to 28 U.S.C. §1257(3) and Rule 17(1)(b) and (c) of the United States Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution are involved in this Petition. Florida Statutes Section 893.135 is also involved in this Petition. The full texts of the Constitutional provisions and the Statute is included in the Appendix to this Petition (App. 14 to 19).

STATEMENT OF THE CASE AND FACTS

On February 25, 1980, Petitioner's motor vehicle was stopped by the Collier County Sheriff's Department. After stopping the vehicle, the officer noticed some marijuana on the loading board of the truck. Based on this fact, Petitioner was arrested and charged with possession of marijuana in violation of Florida Statute 893.135. Subsequent to the arrest, a search warrant was obtained and a search revealed a large quantity of marijuana.

On March 18, 1980, the State Attorney's Office filed an information charging Petitioner with possession of marijuana in violation of Florida Statute 893.135(1)(a)(2).

On June 9, 1980, Petitioner filed a motion to suppress the physical evidence since the initial stop of Petitioner's motor vehicle violated the Fourth and Fourteenth Amendments of the United States Constitution. In order to avoid repetition, the relevant testimony concerning the legality of this stop will be discussed in the Argument portion of this Petition. The issue of the legality of the search was also raised at the trial and in the appellate courts.

On July 9, 1980, a motion to dismiss the information due to the fact that Florida Statute 893.135(3) violated the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution was filed. The motion was denied by the trial court. The issue was also presented to the Fourth District Court

of Appeal. The appellate court affirmed the trial court's ruling.[1]

The jury, on July 16, 1980, returned a verdict of guilty. Pursuant to Florida Statute 893.135(3), Petitioner was sentenced to fifteen (15) years incarceration with a mandatory minimum of five (5) years without parole and a $50,000.00 fine. One of the reasons the sentence was so harsh was because Petitioner refused to cooperate with the authorities. This Petition concerns itself partly with the constitutionality of a statute that punishes a defendant for exercising his Fifth Amendment right to silence.

REASONS WRIT SHOULD BE GRANTED

POINT I

FLORIDA STATUTE 893.135 VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Florida Statute 893.135(3) states:

> "(3) The state may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial

[1]The Florida Supreme Court held the statute to be constitutional in the case of *State v. Benitez*, 395 So.2d 514 (Fla. 1981). A copy of that case is included in the Appendix to this Petition at App. 20.

assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance."

A. SECTION 893.135(3), FLORIDA STATUTES, IMPOSES A PENALTY FOR THE EXERCISE OF THE RIGHT TO SILENCE AND, THEREFORE, VIOLATES THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Florida court's upholding of Florida Statute 893.135(3), which penalizes a defendant if he exercises his right to silence, is in direct conflict with this Court's decision in *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) and the Fifth Amendment of the United States Constitution.

Under subsection (3) of the Florida Statute, the defendant must waive his constitutional right to silence by providing "substantial assistance" to the state attorney in order to qualify for discretionary consideration. Therefore, if a defendant wishes to exercise his right to silence, he is penalized for doing so by not being allowed to qualify for discretionary consideration.

It has long been recognized that where a statute penalizes the assertion of a constitutional right, that

statute is unconstitutional. In *United States v. Jackson, supra*, this Court held that a statute which induced a plea of guilty in order to avoid facing the death penalty was unconstitutional. The Court concluded that the death penalty provision of the statute:

> ". . . needlessly penalized the assertion of a constitutional right and was therefore unconstitutional."

This principle has been reaffirmed in *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966); *United States v. Acosta*, 501 F.2d 1330 (5th Cir. 1974); and *United States v. Moore*, 427 F.2d 38 (5th Cir. 1972).

Thus, in accordance with the principle laid down by the High Court and the federal appellate courts, Section 893.135(3) violates the right to silence guaranteed by the Fifth Amendment of the United States Constitution.

B. SECTION 893.135(3), FLORIDA STATUTES, COERCES SELF-INCRIMINATION WITHOUT GRANTING IMMUNITY AND, THEREFORE, VIOLATES THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Section 893.135(3) of the Florida Statutes coerces self-incrimination and, therefore, is in direct conflict with the Fifth Amendment of the United States Constitution and the cases of *United States v. Acosta, supra*, and *United States v. Garcia*, 544 F.2d 681 (3rd Cir. 1976), so as to warrant the granting of certiorari in this case.

In order to receive discretionary consideration in sentencing, Section 893.135(3) requires the defendant to render "substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators or principals." This section coerces a defendant to give testimony against himself in order to receive a lighter sentence. Thus, under this statute, a defendant is coerced into incriminating himself by the threat of severe punishment and once he does so, he is not even guaranteed a discretionary sentence since the statute does not contain an immunity clause.

In order to render "substantial assistance," a defendant must necessarily implicate others and by so doing, acknowledges his own guilt without being offered immunity. This clearly is a violation of defendant's rights against self-incrimination. This violation was recognized in Judge Gee's dissent in *United States v. Acosta, supra*, 501 F.2d at 1337, 38:

> "While I can only sympathize with the court's efforts to reach the drug hierarchy through Acosta, the record suggests the possibility that the court may actually have taken Acosta's refusal to cooperate into account in sentencing. If so, under such authorities as *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966) and *United States v. Rodriguez*, 498 F.2d 302 (5th Cir. 1974), the sentence should be vacated and a new sentence imposed without consideration of this refusal. As we said in *Rodriguez*,
>
> > In *Thomas v. United States* . . . we held it a clear abuse of discretion for the sentencing judge to threaten the man before him

with a more severe sentence if he did not "come clean" and admit his guilt. As we explained, the defendant retains important Fifth Amendment rights after the jury reaches a verdict, rights which must not be made the price of sentencing leniency. The court cannot place the defendant in the dilemma of either abandoning his Fifth Amendment rights or risking a harsher sentence.

True it is that in both cases the court was urging the convicted defendant to acknowledge only his own guilt, but I am unable to see how Acosta could have implicated others without, at least tacitly, admitting his own complicity."

Under subsection (3), the defendant is given no immunity from prosecutions for violations of other applicable statutes of this or other jurisdictions. A statute's failure to provide immunity was discussed in *United States v. Garcia, supra.* The court there recognized that when a defendant implicates others, he usually incriminates himself, and that immunity must be offered in order to prevent this self-incrimination. The court stated at 544 F.2d, 685:

"The appellants were put in a Hobson's choice: remain silent and lose the opportunity to be objects of leniency, or speak and run the risk of additional prosecution. A price tag was thus placed on appellants' expectation of maximum consideration at the bar of justice: they had to waive the protection afforded them by the Fifth Amendment. This price was too

high. We, therefore, cannot permit the sentences to stand."

Based on the fact that Section 893.135(3) is in direct conflict with the above-mentioned cases, this court should grant certiorari in this matter.

C. THE MANDATORY SENTENCING SCHEME UNDER 893.135, FLORIDA STATUTES, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND THUS VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Florida decision upholding Florida Statute 893.135, despite the fact that the mandatory sentencing procedure it provides precludes the exercise of discretion by the court or by the jury, is in direct conflict with this Court's opinions in *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) and *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), so as to warrant this Court's grant of the writ of certiorari in this case.

In *Woodson & Roberts*, state statutes which required a mandatory death sentence upon conviction of particular crimes were held cruel & unusual because such statutes precluded the exercise of discretion by the court and by the jury.

In *Woodson v. North Carolina, supra*, 96 S.Ct. 2991, the Court wrote:

"This Court has previously recognized that 'for the determination of sentences, justice

> generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.' *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55, 58 S.Ct. 59, 61, 82 L.Ed. 43 (1937). *Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development.*" (Emphasis added.)

The Court relied on *Williams v. New York*, 337 U.S. at 247-249, 69 S.Ct. at 1038-1084. In discussing a New York statute that give judges broad discretion to decide the type and extent of punishment for convicted defendants, the Court stated:

> "Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that *the punishment should fit the offender and not merely the crime. People v. Johnson*, 252 N.Y. 387, 392, 169 N.E. 619. *The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.*" (Emphasis added.)

It is a well-known principle of law that the trial court has a positive duty to exercise its discretion and any type of sentence may be reversed when such positive duty is found lacking. *United States v. Williams*, 407 F.2d 940 (4th Cir. 1969); *United States v. Wilson*, 450 F.2d 495 (4th Cir. 1971).

Section 893.135, Florida Statutes, allows discretion only when the state attorney moves the sentencing court to reduce or suspend the sentence of any person convicted under this statute. Then and only then can the sentencing court consider aggravating and mitigating circumstances and exercise its discretion by reducing or suspending the offender's sentence. However, if a person was a first offender or was involved in the crime to a very limited extent and has no information to offer the state attorney, the state attorney is precluded from recommending that the court exercise discretion as to him. This statute protects the more culpable offender who is less deserving of discretionary consideration. Thus, where the legislature recognized the need for the exercise of discretion and allowed this possibility to the more culpable and excluded it from the least culpable, the statute mandates cruel and unusual punishment. *Woodson v. North Carolina, supra; Roberts v. Louisiana, supra;* and, *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

D. THE ESSENTIAL TERMS OF SECTION 893.135(3), FLORIDA STATUTES, ARE SO VAGUE AND SUBJECTIVE THAT THEY FAIL TO PROVIDE DUE PROCESS OF LAW AND, THEREFORE, VIOLATE THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION NINE OF THE FLORIDA CONSTITUTION.

Subsection (3) provides that the state attorney may recommend that a defendant's sentence be reduced or suspended if that defendant gives "substantial assistance." However, the statute does not define what

constitutes "substantial assistance." It gives the prosecutor total discretion in determining whether a defendant's assistance was "substantial" enough to recommend a reduction or suspension of his sentence. Thus, the terms "substantial assistance" in the statute are too vague and subjective to support the plea bargaining process that they are supposed to enact. These terms fall under the "void for vagueness" doctrine as they violate due process. See, generally, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); *United States v. Evans*, 333 U.S. 483, 68 S.Ct. 634, 92 L.Ed. 823 (1943); *Graynard v. Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

In *Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242, 1247-1249, 39 L.Ed.2d 605 (1974), this Court held that a provision of the Massachusetts flag misuse statute was void for vagueness under the due process clause. The Court, in discussing the due process doctrine of vagueness, stated:

> "The settled principles of that doctrine require no extensive restatement here. The doctrine incorporates notice of fair notice or warning. *'Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement.'* (*Graynard v. Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-2299, 33 L.Ed.2d 222 (1972))." (Emphasis added.)

The Court went further in talking about that doctrine's application to the statutory provision by stating:

> *"Statutory language of such a standardless sweep allows* policemen, *prosecutors,* and juries *to pursue their personal predilections* . . . where inherently vague statutory language permits such selective law enforcement there is a denial of due process." (Emphasis added.)

Thus, in application of the principle expressed above, it is clear that the terms "substantial assistance" are so vague and subjective that the statute violates the due process clause of the Fourteenth Amendment of the United States Constitution so as to warrant the granting of certiorari in this case.

E. SECTION 893.135(3), FLORIDA STATUTES, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Under subsection (3), unless the defendant renders "substantial assistance," the state attorney is precluded from making any non-mandatory sentence recommendation to the court and the defendant is subject to the mandatory terms required under the statute. Therefore, "substantial assistance" is a prerequisite to a consideration of a non-mandatory term. Thus, a defendant who was involved with an accomplice or co-conspirator, or who has "inside" information to render, is given the opportunity to receive a reduction or suspension of sentence, while a defendant who is not involved with accessories or co-conspirators or who has no "inside" information to give, is not given such an opportunity. Subsection (3), which was designed to

catch the more culpable defendant, affords the more culpable defendant an opportunity to receive a reduction or suspension of sentence while not affording the same opportunity to the least culpable defendant. The least culpable defendant is thus discriminated against, not because he will not cooperate, but because he cannot.

Subsection (3) not only discriminates against the least culpable defendants, but also against those defendants who wish to exercise their constitutional right to silence and, thus, subject themselves automatically to a mandatory prison term for the exercise of this right.

This Court recognized the importance of the equal protection clause in *McLaughlin v. Florida*, 379 U.S. 184, 194, 85 S.Ct. 283, 290, 13 L.Ed.2d 222 (1964), wherein a racially discriminating Florida Statute was invalidated. The Court, citing *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), stated:

> "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."

It is apparent there are no legitimate state interests served by discriminating against a defendant when he renders no "substantial assistance" because he has no information to give or by penalizing a defendant who exercises his constitutional right to remain silent. In these instances, subsection (3) violates the equal protection

clause of the Fourteenth Amendment and is thus unconstitutional.

F. SECTION 893.135(3), FLORIDA STATUTES, VIOLATES THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT IT PRECLUDES DEFENDANT'S PRESENCE AT A CRITICAL STAGE OF THE PROCEEDING.

Section 893.135(3) provides that where a defendant provides "substantial assistance" and the state attorney recommends the sentencing court to reduce or suspend his sentence, that the arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such recommendation. However, the defendant is denied this same opportunity at this critical stage when sentence will be pronounced.

It has long been held that sentencing is a critical stage of the criminal process. *See Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967). The defendant has the right to be present and represented by counsel at all critical stages. (Sixth Amendment to the United States Constitution; *Mempa v. Rhay, supra; Williams v. State*, 337 So.2d 846 (Fla. 2nd DCA 1979)). Since sentencing is a critical stage, the defendant is entitled to be present and to be represented by counsel at such stage. However, subsection (3) fails to provide the defendant with these basic rights.

Since the holding of the Florida court is in direct conflict with the holding in *Mempa v. Rhay, supra*, this Court should grant certiorari in this case.

G. WHETHER THE FAILURE OF FLORIDA STATUTE 893.135 TO PROVIDE A MAXIMUM SENTENCE MAKES THE STATUTE SO VAGUE AS TO BE VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

No subsection of Florida Statute 893.135 provides for or advises a defendant of the maximum sentence that could be imposed upon conviction. Failure to provide a maximum sentencing provision makes the statute so vague as to be violative of the due process clause of the Fourteenth Amendment of the United States Constitution.

The United States Supreme Court in *Graynard v. Rockford, supra,* in discussing the concept of vagueness, stated:

> "if arbitrary and discriminatory enforcement is to be prevented, laws must provide *explicit standards* for those who apply them." (Emphasis added)

It is inescapably clear that without a maximum sentence provision, the courts do not have an explicit standard to apply to defendants convicted of violation of Florida Statute 893.135.

Further support for Petitioner's contention that Florida Statute 893.135 is unconstitutionally vague due to the fact that it fails to provide maximum sentence provision is found by examining Federal Rules of Criminal Procedure, Rule 11, entitled *Pleas* and Florida Rules of

Criminal Procedure, Rule 3.170, entitled *Pleas Discussions* and *Agreements*. Both rules state that a trial court, prior to accepting a tendered guilty plea, must advise a defendant of the maximum sentence that could be imposed upon conviction. Failure to so advise a defendant constitutes a violation of the defendant's right to due process. In theory, since Florida Statute 893.135 fails to provide a maximum sentencing provision, a court would be unable to accept a tendered guilty plea because a court would be unable to comply with either Federal Rules of Criminal Procedure, Rule 11 or Florida Rules of Criminal Procedure, Rule 3.170 which safeguards a defendant's right to due process. In effect, the absence of sentencing provisions prevents a defendant from exercising his right to plead guilty which in and of itself is a violation of due process.

SUMMARY

Since Section 893.135(3), Florida Statutes, is in direct conflict with numerous decisions of this Court, and the federal appellate courts, this Court should grant Petitioner's petition for certiorari so as to resolve the apparent conflicts.

POINT II

WHETHER THE STOPPING OF PETITIONER'S MOTOR VEHICLE WITHOUT PROBABLE CAUSE OR REASONABLE SUSPICION TO BELIEVE THAT A CRIME HAD BEEN COMMITTED VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A. THE STOP WAS UNCONSTITUTIONAL

The Court should allow the writ in this case since the decision of the trial court and the opinion of the appellate court are in direct conflict with this Court's opinions in *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 882, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607 (1975); and, *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

In this case, Petitioner's motor vehicle was stopped by the Collier County Sheriff's Department based on the fact that the vehicle appeared to be a suspicious vehicle. The issue that must be decided is whether the initial stop of the vehicle violated the Fourth Amendment of the United States Constitution.

At the motion to suppress physicial evidence, the State of Florida introduced three witnesses in its attempt to establish that the stop of Petitioner's motor vehicle did not violate the Fourth Amendment. For clarity, Petitioner will briefly outline the testimony of the three witnesses who testified at the motion to suppress.

CURTIS SMALLWOOD

On February 25, 1980, Mr. Smallwood, a Collier County Deputy Sheriff, while off duty, was visiting a friend. Upon leaving his friend's residence, Mr. Smallwood saw a black El Camino heading in an easterly direction. Mr. Smallwood testified that he had not seen this vehicle in the area before.

After seeing the black El Camino, Mr. Smallwood also saw a Dodge four-door sedan heading in the same direction as the El Camino. Mr. Smallwood's testimony conflicts as to whether he recognized the driver of that automobile. At one point in the hearing, Mr. Smallwood testified that he recognized the driver of the Dodge sedan to be a known drug smuggler. Later on in the hearing, Mr. Smallwood testified that the only person he recognized in any of the vehicles was the driver of the El Camino. Petitioner's vehicle was not seen with these vehicles.

After Mr. Smallwood saw these two motor vehicles, he observed a black truck heading north on Birdon Road, and a silver van heading south on the same road. Mr. Smallwood testified that he saw the truck and van stop side-by-side for approximately three minutes. Mr. Smallwood did not recognize the truck or the van.

When the truck began to proceed again, Mr. Smallwood followed the truck for a short distance. Mr. Smallwood eventually passed the truck and then observed the truck make a turn and head in the opposite direction. After seeing this activity, Mr. Smallwood called the station and told Charles Sanders what he had seen.

CHARLES SANDERS

On February 25, 1980, Charles Sanders, a Collier County Deputy Sheriff, was driving his automobile in the Birdon Road area. While driving in this area, Mr. Sanders noticed five individuals gathered together talking on the side of the road. Mr. Sanders recognized two of the individuals to be known drug smugglers. He did not see Petitioner's truck in the same area that he saw the five individuals.

After seeing these individuals, Mr. Sanders went back to the station and reported this information to Lieutenant David Keene. While at the station, Mr. Sanders received a telephone call from Mr. Smallwood telling him about the truck that he had seen in the Birdon Road area.

After receiving this information, Mr. Sanders left the station and headed to the area in his patrol car. While in the area, Mr. Sanders saw a truck that he believed to be the same truck that Mr. Smallwood had told him about. Sanders followed the truck for two and one-half miles and, in his opinion, the truck appeared to be heavily loaded. Sanders relayed this information to Lieutenant Keene and, based on Keene's orders, the truck was stopped.

After stopping the truck, Mr. Sanders got out of his patrol car and questioned the driver (Petitioner). While questioning Petitioner, Sanders smelled marijuana coming from the truck and told Petitioner that he believed that the truck was "loaded." Petitioner denied any knowledge of what was in the truck. Mr. Sanders arrested

Petitioner and subsequently read him his rights. Mr. Sanders did not search the truck until he received a warrant.

DAVID KEENE

After Mr. Smallwood called Mr. Sanders and told him about the suspicious truck, Mr. Keene went in his unmarked car to the area. While in the area, Keene saw the black El Camino but did not see anybody in it. As Mr. Keene was driving, he saw the truck pass him. Mr. Keene did not see where the truck went nor did he follow the truck.

Approximately one-half mile after Mr. Keene passed the truck, he noticed an individual, by the name of David Fogel, on the side of the road. Mr. Keene asked Fogel what he was doing and Fogel told him he was fishing. Mr. Keene did not have any information indicating that David Fogel was involved in drug smuggling.

After talking to David Fogel, Mr. Keene went back to the patrol station. While back at the station, Mr. Sanders called Mr. Keene at the station and told him that he had seen the truck. Mr. Keene instructed Mr. Sanders to follow the truck and make sure that Mr. Sanders was following the same truck that Mr. Smallwood and Mr. Keene had seen.

After giving these instructions to Mr. Sanders, Mr. Keene got back in his car and started back to Copeland Grade. While heading back to Copeland Grade, Mr. Keene received a call from Mr. Sanders advising him that he was following the right truck.

After receiving this call, Mr. Keene instructed Mr. Sanders to stop the truck. Mr. Keene ordered the truck stopped due to the fact that the truck was in a suspicious place and that he had knowledge that a couple of weeks earlier, a load of marijuana had been brought into the Naples area.

The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention, short of a traditional arrest. *Brown v. Texas, supra; Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969); and, *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Whenever an individual is approached and stopped by a police officer, that individual has been seized and the Fourth Amendment requires that the seizure be reasonable. *United States v. Brignoni-Ponce, supra.*

In determining whether a seizure is reasonable under the Fourth Amendment, the Court in *Brown v. Texas, supra*, 99 S.Ct., at 2640, set up the following standard:

> "To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. *Delaware v. Prouse; supra*, at _____, 99 S.Ct., at 1396. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 558-562, 96 S.Ct. 3074, 3083-3085, 49 L.Ed.2d 1116 (1976)."

The facts in the instant case merely established that Petitioner's truck was in a suspicious location and that the truck appeared heavily loaded.[2] The officer believed that the truck was in a suspicious location since he had earlier seen other suspicious vehicles, owned by known drug smugglers, in the area. It should be noted, however, that the officer clearly testified that he never saw Petitioner's vehicle near these other suspicious vehicles.[3]

In *Brown v. Texas, supra*, the defendant was stopped in an alley which known drug smugglers frequented. In ruling that this was insufficient, the Court held:

> "The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct."

By ruling that the fact that Petitioner's truck was in a suspicious area was sufficient to justify a stop in this case, the opinion of the Florida Appellate Court is in direct conflict with the above-mentioned cases decided by this Court. For this reason, this Court should allow the writ to issue in this case.

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[2]In *Romanello v. State*, 365 So.2d 220 (Fla. 3rd DCA 1978), the court held that the fact that a vehicle looked to be carrying a heavy load was insufficient to raise enough suspicion to stop a vehicle. A copy of the *Romanello* opinion is included in the Appendix at App. 37.

[3]In *Oesterle v. State*, 382 So.2d 1293 (Fla. 2d DCA 1980), the court held that the fact that a truck was in an area where marijuana was alleged to be was insufficient to justify a stop. A copy of the *Oesterle* opinion is included in the Appendix at App. 41.

B. THE SEARCH WAS UNCONSTITUTIONAL

The law is clear that if a stop of an individual is illegal then the subsequent search of that individual's property is also illegal, if that search is a direct result of the stop.

In the instant case, the probable cause to obtain a search warrant resulted directly from the illegal stop. Therefore, if the stop was illegal, the subsequent search was also illegal.

CONCLUSION

The issuance of the writ is justified in this case.

The constitutional questions raised by the record warrant full consideration by this Court so that the lower courts may secure guidance in meeting the dilemmas created by the Florida "trafficking statute" and the extension of the stop and search issues.

Respectfully submitted,

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Miami, Florida 33137
Telephone: (305) 576-6590

BY _____
MILTON E. GRUSMARK

and

_____
Robert Kalter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed to the Office of the United States Solicitor General, Department of Justice, Washington, D.C. 20530, and to the Office of the United States Attorney, 500 Zack Street, Room 410, Tampa, Florida 33601, this ____ day of August, 1981.

Law Offices of
MILTON E. GRUSMARK, P.A.
Attorneys for Petitioner
3628 N.E. Second Avenue
Miami, Florida 33137
Telephone: (305) 576-6590

BY _____
MILTON E. GRUSMARK

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to
Petition for
Writ of Certiorari

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND,
IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

STEVEN DONALD ALANDER,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Case No. 80-1787

Opinion filed May 13, 1981.

Appeal from the Circuit Court for Collier County; Ted Brousseau, Judge.

J. Blan Taylor, Naples and Milton E. Grusmark and Robert Kalter of Law Offices of Milton E. Grusmark, P.A., Miami, for Appellant.

Jim Smith, Attorney General, Tallahassee and James S. Purdy, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Affirmed.

BOARDMAN, A.C.J., RYDER and CAMPBELL, JJ., Concur.

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

CASE NO: 80-1787

STEVEN DONALD ALANDER,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

MOTION FOR REHEARING

COMES NOW the Appellant, STEVEN DONALD ALANDER, by and through his undersigned counsel, pursuant to Rule 9.330(a), Florida Rules of Appellate Procedure, and files this Motion for Rehearing. This Motion is directed to the Opinion filed in this Court on May 13, 1981. The symbol "SR" will be used to designate the testimony taken at the Motion to Suppress hearing.

I.

The Court overlooked and failed to consider the fact that the distinction between *Taylor v. State*, 384 So.2d 1310 (2d DCA 1980) and *Oesterle v. State*, 382 So.2d 1293 (2d DCA 1980) is determinative in the case at bar. In *Taylor*, the conviction of the defendant was affirmed on the theory that that defendant had sufficiently associated himself from the public so as to establish a well-founded suspicion upon which the officers could base the stop. In *Oesterle, supra*, however, the court

reversed the conviction upon the finding that there was no association with the suspicious situation so as to distinguish that defendant from the public.

II.

Applying the two cases to the case at bar, it is apparent that in filing its curiam affirmed Opinion, this Court overlooked and failed to consider the fact that testimony in this case placed the situation clearly within the law enunciated in *Oesterle, supra.* There was no association between Appellant and the alleged "suspicious situation". The contention of the State in this case is that the suspicious situation is a meeting of "known drug smugglers". The following testimony is supportive of Appellant's position:

* * *

Q Well, you are the arresting officer?

A Right.

Q And the truck that we are here about, was that truck anywhere in the vicinity?

A Not that I saw.

Q *You did not see that truck?*

A *No.* (SR 62) [emphasis added]

* * *

Q Did anybody ever tell you that they had seen that truck around any of those suspicious people?

A Blan, being truthful, not until after the stop was made. (SR 68)

* * *

Q Did you know anything connected that truck with those people at any time?

A Just what I was told by the deputy. I didn't know it myself. I didn't see it.

Q What did they tell you they had, these people?

A I think you have got a witness coming up next that can pretty well tell you that. He's going to testify to it anyway. I will answer if you want me to.

Q *Let me ask you this. Prior to the time you stopped the truck—*

A *No.*

Q *—did you have anything that connected—*

A *No.*

Q *—those people?*

A *No.*

Q *— that were on Birdon Road and the truck together?*

A *No.*

Q *Did you have anything that connected that truck with anybody?*

A Prior to the stop?

Q *Yes.*

A *No.* (SR 87-88) [emphasis added]

It is inescapably clear that there was a total lack of association between the Appellant and the alleged "suspicious situation." Therefore, the stop of the Appellant was based on mere suspicion which is, as a matter of law, insufficient to justify the stop. *Romanello v. State*, 365 So.2d 220 (4th DCA 1978).

WHEREFORE, Appellant respectfully requests this Court to grant a rehearing and reverse the conviction of the Appellant.

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 28th day of May, 1981 to: Jim Smith, Attorney General, Park Trammell Building, 8th Floor, 1313 Tampa Street, Tampa, Florida 33602; and

the State Attorney's Office, Collier County Courthouse, East Naples, FL 33942.

Respectfully submitted,

J. BLAN TAYLOR, ESQ.
3714 East Tamiami Trail
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and

Law Offices of
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Phone: (305) 576-6590

By: /s/ Kutner
Peter Kutner

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

CASE NO: 80-1787

STEVEN DONALD ALANDER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

MOTION FOR REHEARING EN BANC

Appellant, STEVEN DONALD ALANDER, by and through his undersigned counsel, pursuant to Rule 9.330(a), Florida Rules of Appellate Procedure, files this Motion for Rehearing En Banc. This Motion is directed to the Opinion filed in this Court on May 13, 1981.

REQUIRED STATEMENT FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of this Court and that a consideration by the full Court is necessary to maintain uniformity of decisions in this Court:

Oesterle v. State, 382 So.2d 1293 (2d DCA 1980)

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 28th day of May, 1981 to: Jim Smith, Attorney General, Park Trammell Building, 8th Floor, 1313 Tampa Street, Tampa, Florida 33602; and the State Attorney's Office, Collier County Courthouse, East Naples, FL 33942.

Respectfully submitted,

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and

Law Offices of
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3628 N.E. Second Avenue
Miami, Florida 33137
Phone: (305) 576-6590

By: /s/ Kutner

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA
JULY 8, 1981

Case No. 80-1787

STEVEN DONALD ALANDER,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Counsel for appellant having filed a motion for rehearing in the above-styled cause, upon consideration, it is

ORDERED that said motion is hereby denied.

A TRUE COPY
TEST:

/s/ William Haddad
CLERK DISTRICT COURT OF APPEAL
SECOND DISTRICT

cc: J. Blan Taylor
Milton E. Grusmark
Attorney General

7-24-81

RE: Steven Donald Alander v. State of Florida
Case No. 80-1787

MANDATE WAS FORWARDED
TO TRIAL COURT TODAY.
Clerk, Second District Court of Appeal,
Lakeland, Florida

AMENDMENT IV.

Searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V.

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VIII.

Excessive bail, fines, punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV.

§1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FLORIDA STATUTES (1979), Section 893.135 Trafficking; mandatory sentences; suspension or reduction of sentences

(1) Except as authorized in this chapter or in

chapter 500 and notwithstanding the provisions of s. 893.13:

(a) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of 100 pounds of cannabis is guilty of a felony of the first degree, which felony shall be known as "trafficking in cannabis." If the quantity of cannabis involved:

1. Is in excess of 100 pounds, but less than 2,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $25,000.

2. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $50,000.

3. Is 10,000 pounds or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $200,000.

(b) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine as described in s. 893.03(2)a(4). or of any mixture containing cocaine is guilty of a felony of the first degree, which felony shall be known as "trafficking in cocaine." If the quantity involved:

1. Is 28 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum

term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $100,000.

3. Is 400 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $250,000.

(c) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of any morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b) or (2)(a), or 4 grams or more of any mixture containing any such substance, is guilty of a felony of the first degree, which felony shall be known as "trafficking in illegal drugs." If the quantity involved:

1. Is 4 grams or more, but less than 14 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 14 grams or more, but less than 28 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 10 calendar years and to pay a fine of $100,000.

3. Is 28 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 calendar years and to pay a fine of $500,000.

(d) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of phencyclidine or of any mixture containing phencyclidine, as described in s. 893.03(2)(b[1]), is guilty of a felony of the first degree, which felony shall be known as "trafficking in phencyclidine." If the quantity involved:

1. Is 28 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $100,000.

3. Is 400 grams or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $250,000.

(e) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 200 grams or more of methaqualone or any any mixture containing methaqualone, as described in s. 893-03(2)(c), is guilty of a felony of the first degree, which felony shall be known as "trafficking in methaqualone." If the quantity involved:

1. Is 200 grams or more, but less than 5 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 calendar years and to pay a fine of $50,000.

2. Is 5 kilograms or more, but less than 25 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 5 calendar years and to pay a fine of $100,000.

3. Is 25 kilograms or more, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and to pay a fine of $250,000.

(2) Notwithstanding the provisions of s. 948.01, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this section.

(3) The state attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance.

STATE of Florida,

Appellant,

v.

Carlos M. BENITEZ and Esperanza Benitez,

Appellees.

Supreme Court of Florida.

Feb. 12, 1981.

No. 57834.

Rehearing Denied April 13, 1981.

Defendants were charged by information with trafficking in cocaine in violation of drug trafficking statute. In ruling on motion to dismiss charges, the Circuit Court, Dade County, Jon I. Gordon, J., entered order declaring statute facially invalid, and State appealed. The Supreme Court, England, J., held that: (1) defendants had standing to contest constitutionality of statute; (2) mandatory minimum sentences section of statute did not violate cruel and unusual punishment clauses of State and Federal Constitutions; (3) phrase "substantial assistance" in section of statute defining convicted defendant who is eligible for lenient treatment as any person who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, was not unconstitutionally vague or violative of due process; (4) statute which provided for lenient sentencing of cooperative defendant was not unconstitutional on theory that it denied equal protection

of law to convicted defendants who could not provide substantial assistance to law enforcement officials; (5) statute did not violate constitutional separation of government powers; and (6) statute was not unconstitutional on theory that it coerced defendant into relinquishing his Fifth Amendment privilege against self-incrimination by denying him sentencing leniency unless he cooperated with authorities.

Reversed and remanded.

1. Constitutional Law—42.1(3)

Defendants charged under drug trafficking statute had sufficient personal stake in penalty which offense carried to give them standing to challenge constitutionality of statute. West's F.S.A. §893.135.

2. Criminal Law—1213

Mandatory minimum sentences provided in drug trafficking statute did not violate cruel and unusual punishment clauses of State and Federal Constitutions on theory that mandatory minimum sentences unconstitutionally eliminate exercise of discretion in sentencing. West's F.S.A. §893.135(1); West's F.S.A. Const. Art. 1, §17; U.S.C.A. Const. Amend. 8.

3. Criminal Law—1213

Mandatory minimum sentences of drug trafficking statute did not constitute cruel and unusual punishment in violation of State and Federal Constitutions on theory that they were unnecessarily severe and disproportionate to nature of crime in light of potential deterrent value

and seriousness of crime involved. West's F.S.A. §893.135(1); West's F.S.A. Const. Art. 1, §17; U.S.C.A. Const. Amend. 8.

4. Criminal Law—5

Legislature, and not judiciary, determines maximum and minimum penalties for violations of law.

5. Constitutional Law—258(3)
Drugs and Narcotics—13

Phrase "substantial assistance" in subsection of drug trafficking statute which provides that convicted defendant who provides substantial assistance in indentification, arrest, or conviction of any of his accomplices, accessories, coconspirators, or principals is eligible for lenient treatment in sentencing, being description of postconviction form of plea bargaining rather than definition of crime itself, can tolerate subjectivity to extent which normally would be impermissible in penal statutes, and does not violate due process. West's F.S.A. §§893.135, 893.135(3); U.S.C.A. Const. Amend. 14.

6. Drugs and Narcotics—43

Subsection of drug trafficking statute which provides that a convicted defendant who provides substantial assistance in identification, arrest, or conviction of any of his accomplices, accessories, coconspirators, or principals, is eligible for lenient treatment in sentencing, is not impermissibly vague in defining such eligible convicted defendant since "substantial assistance" is

susceptible of common understanding in context of whole statute. West's F.S.A. §§893.135, 893.135(3).

7. Constitutional Law—250.1(2)
Drugs and Narcotics—43

Subsection of drug trafficking statute which provides that convicted defendant who provides substantial assistance in identification, arrest, or conviction of any of his accomplices, accessories, coconspirators, or principals, is eligible for lenient treatment is not unconstitutional on theory that such subsection denies equal protection of law to convicted defendants who cannot provide "substantial assistance" to law enforcement officials. West's F.S.A. §§893.135, 893.135(3); U.S.C.A. Const. Amend 14.

8. Constitutional Law—55
Drugs and Narcotics—43

Section of drug trafficking statute which provides that convicted defendant who cooperates with authorities in the arrest of accessories, accomplices, or coconspirators, is eligible for lenient treatment is not unconstitutional on theory that such subsection encroaches on court's rule-making role in violation of constitutional separation of governmental powers. West's F.S.A. §893.135(3); West's F.S.A. Const. Art. 2, §3; Art. 5, §2(a).

9. Constitutional Law—55
Drugs and Narcotics—43

Rule of criminal procedure which permits reduction of legal sentences but specifically excludes minimum mandatory sentences from its operation is not

incompatible with drug trafficking statute which provides minimum mandatory sentence; thus, statute is not unconstitutional on theory that statute violates constitutional separation of government powers by encroaching on court's rule-making role. West's F.S.A. §893.135; West's F.S.A. Const. Art. 2, §3; Art. 5, §2(a); 34 West's F.S.A. Rules of Criminal Procedure, Rule 3.800(b).

10. Constitutional Law—55
Drugs and Narcotics—43

Drug trafficking statute which does not explicitly exclude defendant for submitting evidence in his own behalf is not incompatible with rule of criminal procedure which provides that court shall entertain submissions and evidence by parties which are relevant to sentence; thus, drug trafficking statute is not unconstitutional on theory that statute violates constitutional separation of governmental powers by encroaching on court's rule-making role. West's F.S.A. §893.135(3); West's F.S.A. Const. Art. 2, §3; Art. 5, §2(a); 34 West's F.S.A. Rules of Criminal Procedure, Rule 3.720(b).

11. Constitutional Law—55
Drugs and Narcotics—43

Procedural safeguards provided in rule of criminal procedure governing plea discussions and agreements which are in conflict with explicit language of subsection of drug trafficking statute which provides for more lenient sentence for convicted defendants who cooperate with authorities in bringing about arrest of coconspirators, are not of constitutional magnitude; thus, drug trafficking

statute is not unconstitutional on theory that it violates constitutional separation of governmental powers by encroaching on court's rule-making role. West's F.S.A. §893.135(3); West's F.S.A. Const. Art. 2, §3; Art. 5, §2(a); 33 West's F.S.A. Rules of Criminal Procedure, Rule 3.171.

12. Constitutional Law—80(1)
Drugs and Narcotics—43

Where, under drug trafficking statute, ultimate decision on sentencing resided with judge who must rule on motion for reduction or suspension of sentence, subsection of drug trafficking statute which provided for more lenient sentence for convicted defendant who cooperated with authorities was not unconstitutional for violation of separation of powers on theory that subsection usurped sentencing function from judiciary and assigned it to executive branch in that benefits of subsection were triggered by initiative of state attorney. West's F.S.A. §893.135(3).

13. Criminal Law—393(1)

Putting defendant to difficult choice is not necessarily forbidden by Fifth Amendment. U.S.C.A. Const. Amends. 5, 14.

14. Criminal Law—393(1)

Where nothing in drug trafficking statute suggested that "substantial assistance" must incriminate defendant of crimes other than those for which he has already been convicted and for which no Fifth Amendment privilege is necessary and defendant need not invoke

subsection of statute providing for more lenient treatment of defendant who cooperates with authorities, drug trafficking statute was not unconstitutional on theory that statute coerces defendant into relinquishing his Fifth Amendment privilege against self-incrimination by denying him sentencing leniency unless he cooperates with authorities. West's F.S.A. §§893.135, 893.135(3); U.S.C.A. Const. Amends. 5, 14.

15. Criminal Law—393(1)

Sentence reduction obtained by sentenced convict due to his cooperation is not tantamount to enhancement of sentence imposed on unsentenced, but convicted defendant as result of his lack of cooperation; thus, subsection of drug trafficking statute providing for sentencing leniency for defendant who cooperates with authorities does not unconstitutionally coerce defendant into relinquishing his Fifth Amendment privilege against self-incrimination. West's F.S.A. §§893.135, 893.135(3); U.S.C.A. Const. Amends. 5, 14.

Jim Smith, Atty. Gen., and Calvin L. Fox, Asst. Atty. Gen., Miami, and Janet Reno, State Atty., and Arthur Joel Berger, Asst. State Atty., Miami, for appellant.

Joseph Beeler, and Brian Richard McComb, Miami, for appellees.

Philip Carlton, Jr. of the Law Offices of Philip Carlton, Jr., Miami, for Daniel Cowgill, amicus curiae.

ENGLAND, Justice.

This case comes to us on direct appeal from a trial court order determining that section 893.135, Florida Statutes (1979)—Florida's newly-enacted "drug trafficking" statute—is unconstitutional.

After Carlos and Esperanza Benitez attempted to sell one kilo of cocaine to undercover narcotics agents for $44,000, they were charged by information with "trafficking in cocaine" in violation of section 893.135. In ruling on motions to dismiss the charges, the trial court entered a lengthy order declaring section 893.135 to be facially invalid on a multiplicity of grounds. The state appeals that order, urging error in each of the trial court's rulings.

Section 893.135 is a unique response to a serious and growing concern of the legislature regarding illegal drug activities in the State of Florida. Subsection (1) of the new law establishes severe mandatory minimum sentences for trafficking in various types of illegal drugs. Subsection (2) prevents the trial court from suspending, deferring or withholding the adjudication of guilt or the imposition of sentence on a person convicted under the law, and it eliminates the defendant's eligibility for parole during the minimum mandatory sentence. Subsection (3) provides an "escape valve" from the statute's rigors, based on the initiative of the prosecuting attorney, by permitting the court to reduce or suspend a sentence if a convicted defendant is willing to cooperate with law enforcement authorities in the detection or apprehension of others involved in drug trafficking.

Section 893.135 was enacted to assist law enforcement authorities in the investigation and prosecution of illegal drug trafficking at all levels of distribution, from the importer-organizer down to the "pusher" on the street. The harsh mandatory penalties of subsection (1), ameliorated by the prospect of leniency in subsection (3), were clearly calculated to provide a strong incentive for drug violators to cooperate with law enforcement authorities and become informers. No one argues that the elimination of illegal drug traffic is not a beneficial and worthwhile goal, or that the goals of this legislation are not meritorious.

Nonetheless, in their zeal to combat the flow and distribution of illegal drugs through this novel legislation, legislators knowingly glossed over alleged constitutional defects in the approach that was being developed. We in the judiciary do not have that luxury. Indeed, the trial judge's extensive and detailed order exhibits the multiple, serious difficulties which this statute poses under well-established constitutional principles. We discern six major challenges to the constitutionality of section 893.135, one directed at the mandatory penalties and five directed at the escape valve in subsection (3). The state also half-heartedly challenges the appellees' standing for the first time on this appeal. This last challenge being the easiest to treat, we discuss it first.

1. *Standing*

[1] The basic rule governing the standing of parties challenging statutory enactments was recently stated in *Sandstrom v. Leader*, 370 So.2d 3, 4 (Fla.1979):

> Fundamental constitutional principles dictate that one may not challenge those portions of an enactment which do not adversely affect his personal or property rights. . . Such a personal stake in the outcome of the controversy is necessary "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions[.]" (citations omitted).

The state argues that, because appellees have not yet been convicted, they have no personal stake in this penalty-oriented statute.

To state the assertion is to demonstrate its absurdity. A party subject to criminal prosecution clearly has a sufficient personal stake in the penalty which the offense carries. This is wholly unlike cases in which criminal defendants have challenged portions of a statute which have nothing to do with their prosecution. *See State v. Millington*, 377 So.2d 685 (Fla.1979); *State v. Champe*, 373 So.2d 874 (Fla.1978).

2. *Cruel and Unusual Punishment*

[2] Appellees argue that the mandatory minimum sentences of section 893.135(1) violate the cruel and unusual punishment clauses of the state[1] and federal[2] constitutions. Relying on various death penalty decisions

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[1] Art 1, §17, Fla. Const.

[2] U.S. Const. amend VIII.

of the United States Supreme Court,[3] they first contend that the mandatory minimum sentences unconstitutionally eliminate the exercise of discretion in sentencing. This argument was rejected by this Court in *McArthur v. State*, 351 So.2d 972 (Fla.1977), and warrants no further discussion here.

[3, 4] Appellees also argue that the mandatory sentences in section 893.135 constitute cruel and unusual punishment since they are unnecessarily severe and disproportional to the nature of the crime. This Court has consistently upheld minimum mandatory sentences, regardless of their severity against constitutional attacks arguing cruel and unusual punishment. *See, e.g., McArthur v. State*, 351 So.2d 972 (Fla.1977); *Banks v. State*, 342 So.2d 469 (Fla.1976); *O'Donnell v. State*, 326 So.2d 4 (Fla.1975). The dominant theme which runs through these decisions is that the legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law. While it is often said that in an extreme case—wherein the sentence was *grossly* disproportionate to the severity of the crime—the legislature's judgment would run afoul of the constitutional prohibitions, this Court has never addressed such a situation in the context of statutory sentencing minima.

The recent decision of the United States Supreme Court in *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980), indicates that similar considerations prevail under the federal constitution.

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[3] *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

In that case, the Court held that a mandatory life sentence imposed on the petitioner pursuant to a Texas recidivist statute did not constitute cruel and unusual punishment under the eighth amendment. The majority's analysis of this area noted that:

> [t]his Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence which is grossly disproportionate to the severity of the crime. . . . In recent years this proposition has appeared most frequently in opinions dealing with the death penalty. . . . Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishment to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel.
>
> Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.

Id., 445 U.S. at 271, 100 S.Ct. at 1138 (citations omitted). After analyzing one of these rare successful challenges, *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), the majority concluded:

> Given the unique nature of the punishments considered in *Weems* and in the death-penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually

> imposed is purely a matter of legislative prerogative.

Id., 445 U.S. at 273, 100 S.Ct. at 1139 (footnote omitted).

The penalties imposed by section 893.135 are certainly severe, but they are by no means cruel and unusual in light of their potential deterrent value and the seriousness of the crime involved. *See McArthur v. State; O'Donnell v. State; accord, People v. Broadie*, 37 N.Y.2d 100, 371 N.Y.S.2d 471, 332 N.E.2d 338, *cert. denied*, 423 U.S. 950, 96 S.Ct. 372, 46 L.Ed.2d 287 (1975).

3. *Due Process-Vagueness*

[5, 6] Little discussion is needed concerning appellees' suggestion that subsection (3) is impermissibly vague in defining a convicted defendant who is eligible for lenient treatment as "any person . . . who provides substantial assistance in the indentification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals." Being a description of a *post-conviction* form of plea bargaining rather than a definition of the crime itself, the phrase "substantial assistance" can tolerate subjectivity to an extent which normally would be impermissible for penal statutes. *Cf. Linville v. State*, 359 So.2d 450 (Fla. 1978) (statutory definition of proscribed activity held unconstitutionally vague). The contested phrase, in any event, is susceptible of common understanding in the context of the whole statute. *Schultz v. State*, 361 So.2d 416 (Fla.1978). There is no due process infirmity.

4. *Equal Protection*

[7] Appellees' suggestion that subsection (3) denies equal protection of the law to convicted defendants who cannot provide "substantial assistance" to law enforcement officials is patently without merit. This legislation manifestly passes the rational basis test. *See Hamilton v. State*, 366 So.2d 8 (Fla.1978).

5. *Separation of Powers*

[8] Two basic arguments by appellees are directed at Florida's constitutional separation of governmental powers. Art. II, §3, Fla.Const. First, they assert that subsection (3) encroaches on the Court's rule-making role, Art. V, §2(a), Fla.Const., in that it conflicts with Rule 3.800(b), Rule 3.720(b), and Rule 3.171 of the Florida Rules of Criminal Procedure. The statute differs from these rules, of course, but it in no way so conflicts with them as to offend the constitution.

[9-11] Rule 3.800(b) permits the reduction of legal sentences, yet since it specifically excludes minimum mandatory sentences from its operation, its procedures obviously are not incompatible with section 893.135. Likewise, Rules 3.720(b) and 3.171 do not pose any obstacle to the operation of section 893.135. Rule 3.720(b) provides that at a sentencing hearing, the court shall "[e]ntertain submissions and evidence by the parties which are relevant to the sentence...." Subsection (3) states that "[t]he arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any [motion for reduction or suspension of sentence]." The statute does not explicitly exclude the defendant from submitting evidence in his behalf, and

it does not offend the statutory scheme to afford him that right. Finally, applicable procedural safeguards in Rule 3.171 can be afforded to defendants, to the extent they do not conflict with the explicit language of subsection (3). No infirmity of constitutional dimension attends the omission of those that do.

[12] Appellees' second argument premised on the constitutional separation of powers is that subsection (3) usurps the sentencing function from the judiciary and assigns it to the executive branch, since the benefits of subsection (3) are triggered by the initiative of the state attorney. Under the statute, the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. "So long as a statute does not wrest from courts the *final* discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities." *People v. Eason*, 40 N.Y.2d 297, 301, 386 N.Y.S.2d 673, 353 N.E.2d 587, 589 (1979) (emphasis in original) (rejecting a separation of powers attack on a similar provision in New York's drug laws).

6. *Self-incrimination*

[13, 14] Finally, the appellees argue that section 893.135 coerces a defendant into relinquishing his fifth amendment privilege against self-incrimination by denying him sentencing leniency unless he cooperates with the authorities. We reject this argument, primarily because it depends on unwarranted assumptions about the nature of the informer's disclosures. Nothing in the statute suggests that "substantial assistance" must incriminate the defendant of crimes other than those for which he has already been convicted (and for which no fifth

amendment privilege is obviously necessary). We acknowledge the risk of prosecution in other jurisdictions. Nonetheless, a defendant need not invoke subsection (3), as nothing in the Statute is compulsive. Putting a defendant to a difficult choice is not necessarily forbidden by the fifth amendment. *See, e. g., Corbitt v. New Jersey*, 439 U.S. 212, 218, 99 S.Ct. 492, 497, 58 L.Ed.2d 466 (1978) ("[N]ot every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right is invalid." (footnote omitted)); *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978); *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971). No constitutional deprivation results if a defendant elects to reap the benefits of subsection (3).

[15] With respect to those cases which say that the trial courts may not enhance a sentence based on a defendant's failure to cooperate with the authorities, *see United States v. Garcia*, 544 F.2d 681 (3rd Cir. 1976); *United States v. Acosta*, 501 F.2d 1330 (5th Cir. 1974) (Gee, J., dissenting), *adopted en banc*, 509 F.2d 539 (5th Cir.), *cert. denied*, 423 U.S. 891, 96 S.Ct. 188, 46 L.Ed.2d 122 (1975); *United States v. Rogers*, 504 F.2d 1079 (5th Cir. 1974), *cert. denied*, 422 U.S. 1042, 95 S.Ct. 2655, 45 L.Ed.2d 693 (1975), we believe that *Roberts v. United States*, 445 U.S. 552, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980), went a long way toward resolving this issue against appellees. The Court in *Roberts* concluded that the district court properly considered the defendant's refusal to cooperate as one factor in imposing consecutive sentences. Admittedly, a fifth amendment claim was not properly raised in *Roberts* and "would have merited serious consideration" if it had been. *Id.* at 1364, 100 S.Ct. at 559. We conclude, however, that for fifth

amendment purposes the situation in *Roberts* is distinguishable from that here. A sentence reduction obtained by a sentenced convict due to his cooperation is not tantamount to the enhancement of a sentence imposed on an unsentenced, but convicted defendant as a result of his lack of cooperation. The former is no different from a gratuitous sentence reduction offered to one already incarcerated who, even without statutory sanction, risks reincrimination in exchange for early release benefits.

Our disposition of appellees' challenges obviates the need to consider the severability of subsection (3) from the statute. We hold that section 893.135 is constitutional. The order of the trial court is reversed, and the case is remanded for further proceedings.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., concur.

Donald Dominick ROMANELLO,

Appellant,

v.

STATE of Florida,

Appellee.

Alan ISELY,

Appellant,

v.

STATE of Florida,

Appellee.

Nos. 77-2205, 77-2215.

District Court of Appeal of Florida,
Fourth District.

Dec. 13, 1978.

Defendants were convicted before the Circuit Court for Broward County, Hort Soper, J., of possession of cannabis, and they appealed. The District Court of Appeals, Schwartz, Alan R., Associate Judge, held that police officers, who approached defendants only, and admittedly, to satisfy what one called a "curiosity," lacked founded or reasonable suspicion of criminal activity required to support officers' initial stop and detention of defendants, and therefore, since officers' sole reasonable basis for believing that offense was being committed, the odor and sight of marijuana, arose only after and because of their initial stop and detention of defendants,

warrantless search and seizure conducted by police officers was unjustified.

Reversed and remanded.

Arrest—63.5(5)
Drugs and Narcotics—184

Police officers, who approached defendants only, and admittedly, to satisfy what one called a "curiosity," lacked founded or reasonable suspicion of criminal activity required to support officers' initial stop and detention of defendants, and therefore, since officers' sole reasonable basis for believing that offense was being committed, the odor and sight of marijuana, arose only after and because of their initial stop and detention of defendants, warrantless search and seizure conducted by police officers was unjustified. West's F.S.A. §901.151.

Kenneth R. Mikos of Friedrich, Kersten, Blackwell & Mikos, Fort Lauderdale, for appellants.

Robert L. Shevin, Atty. Gen., Tallahassee, and Charles A. Stampelos, Asst. Atty. Gen., West Palm Beach, for appellee.

SCHWARTZ, ALAN R., Associate Judge.

After the court had denied their motion to suppress the contraband which was the basis of the charge against them, the appellants were convicted of the possession of cannabis. We hold that the motion should have been granted and reverse the judgments below.

On the forenoon of February 4, 1977, the attention of two Fort Lauderdale police officers, who were each in the area entirely coincidentally, was attracted to the defendants' attempt to trailer a boat at the Seventh Avenue ramp in that city. Romanello was in a van with an attached trailer; Isely, in the boat trying to negotiate it from the water onto the trailer. Only, and admittedly, to satisfy what one called a "curiosity" aroused as a result of the men's having apparent difficulty in the operation because the vessel seemed heavily loaded, the officers—after the boat had finally been successfully trailered—approached and detained both defendants. While one policeman, Lynch, sought motor vehicle information from Romanello, the other, Hudson, asked Isely for the boater's registration. When Hudson followed Isely onto the boat, he allegedly smelled the odor of marijuana emi g from it and said that he noticed a "little glob" of marijuana on the deck. The resulting warrantless search of the boat indeed revealed a large quantity of marijuana for the possession of which both defendants were convicted.

The officers' sole reasonable bases for believing that an offense was being committed, the odor and sight of marijuana, arose only after and because of their initial stop and detention of the defendants.[1] Thus, the search may be upheld only if the stop may. And it is clear that it may not. The mere recitation of the facts which led to the defendants' detention establishes that

[1]For this reason, such cases as *Miranda v. State*, 354 So.2d 411 (Fla. 3rd DCA 1978) and *Tamburro v. State*, 343 So.2d 638 (Fla. 4th DCA 1977), which find "probable cause" for a search based on a smell of marijuana, but in which the officer was lawfully in a position to detect it, are not controlling. *Lower v. State*, 348 So.2d 410 (Fla. 2d DCA 1977).

the officers had nothing approaching the "founded or reasonable suspicion" of criminal activity required to support such conduct. *Lewis v. State*, 337 So.2d 1031, 1032 (Fla. 2d DCA 1976); §901.151, Fla. Stat. (1975). Instead, the officers had only a "hunch" (although a good one, as it turned out), that is, a "bare" or "unfounded" suspicion that something was wrong, which is clearly *not* sufficient to validate a stop and detention. E.g., *Currens v. State*, 363 So.2d 1116 (Fla. 4th DCA 1978), and cases cited; *Whitely v. State*, 349 So.2d 840 (Fla. 2d DCA 1977). Surely, the weighted down appearance of the boat and the difficulties encountered in maneuvering it, which is all the officers had upon which to base their "curiosity," cannot, in this day and age, and particularly in this location, be deemed to provide a proper "foundation" or "reasonable" basis for suspecting the existence of crime.[2] Since the motion to suppress should therefore have been granted, the judgments are reversed with directions to discharge the defendants.

Reversed and Remanded.

LETTS and BERANEK, JJ., concur.

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[2]In much more exacerbated situations involving heavily weighted motor vehicles stopped in the dead of the night near border points in areas of known smuggling activity, the federal courts have apparently uniformly held stops and detentions to be constitutionally unjustified. *United States v. Frisbie*, 550 F.2d 335 (5th Cir. 1977); *United States v. Olivares*, 496 F.2d 657 (5th Cir. 1974).

Ralph Paul OESTERLE,

Appellant,

v.

STATE of Florida,

Appellee.

No. 79-1878.

District Court of Appeal of Florida,
Second District.

April 18, 1980.
Rehearing Denied May 5, 1980.

The Circuit Court, DeSoto County, Gilbert A. Smith, Jr., denied motion to suppress confession and convicted defendant, upon plea of nolo contendere, and defendant appealed. The District Court of Appeal, Grimes, C. J., held that: (1) entry of plea of nolo contendere did not preclude appeal of denial of motion to suppress confession, and (2) the stop and detention of defendant were illegal, and, as a result, confession which officers obtained immediately thereafter was also tainted.

Reversed.

1. Criminal Law—1026

Entry of plea of nolo contendere did not preclude defendant from appealing denial of his motion to suppress.

2. Arrest—63.5(6)

In order for a law enforcement officer to stop and detain a vehicle, officer must have a well-founded suspicion of the presence of criminal activity; a well-founded suspicion is a suspicion which has some factual foundation in the circumstances observed by the officer when those circumstances are interpreted in the light of the officer's knowledge.

3. Arrest—63.5(6)
Criminal Law—519(8)

Where defendant's truck was proceeding lawfully along public road and gave no indication of turning into gate which provided only access to marijuana plane and where truck had out-of-county tag and truck topper's windows were blacked out, stop and detention of defendant were illegal, and, as a result, confession which officers obtained immediately thereafter was also tainted.

Michael H. Hatfield, Umatilla, for appellant.

Jim Smith, Atty. Gen., Tallahassee, and Eula Tuttle Mason, Asst. Atty. Gen., Tampa, for appellee.

GRIMES, Chief Judge.

This is an appeal from the denial of a motion to suppress a confession.

The facts are not in dispute. At the hearing on the motion to suppress, Deputy Jerry Fennell of the Highlands

County Sheriff's Department testified that in the early hours of April 19, 1979, he received word that a plane loaded with marijuana had just landed in DeSoto County near the Highlands County line. He proceeded to the area, where he found the plane in a pasture about two miles southwest of the intersection of two dirt roads, Marguerita Road and Ten Mile Grade Road. The plane was visible from the intersection but could be reached only by going through a gate in a fence on the south side of Ten Mile Grade Road.

At about 5:00 a.m. Deputy Fennell, along with officers in three or four patrol cars and two or three unmarked vehicles, took up a position on Marguerita Road near the intersection. They saw no vehicles until approximately 6:30 a.m. when a pickup truck with a "topper" on the back approached them from the north on Marguerita Road. The truck went past them and turned west onto Ten Mile Grade Road. The officers saw that there was more than one man in the truck and that in the direction the truck was traveling, it would pass the access to the pasture where the plane was located.

Deputy Fennell and another officer got into Fennell's patrol car to follow the vehicle. As they did so, they noticed the truck had an out-of-county tag and that they could not see through the windows of the topper. Fennell then stopped the truck. On direct examination he testified that he could not remember whether he had done so before or after it had passed the entrance to the pasture. On cross-examination, however, he stated that the gate was about three-quarters of a mile from the intersection and that he had stopped the truck approximately one to one and a half miles beyond the intersection.

Shortly after Deputy Fennell stopped the truck, Deputy Kenny Carlton of the DeSoto County Sheriff's Department arrived on the scene and questioned its driver, appellant. During this questioning, appellant admitted that he was in the area to meet the airplane and unload its cargo.

The state charged apellant with trafficking in cannabis. He filed a motion to suppress his statements and admissions, but the court denied this motion. Appellant then entered a plea of nolo contendere, reserving the right to appeal the denial of his motion. The court accepted the plea and made a finding, to which both appellant and the state agreed, that appellant's confession was necessary for the state to obtain a conviction. Thereafter, the court adjudged appellant guilty and sentenced him to five years in prison.

[1] As a preliminary matter, we must first consider whether, having pled nolo contendere, appellant may now appeal the denial of his motion to suppress his confession. In *Brown v. State*, 376 So.2d 382 (Fla. 1979), the supreme court held that a defendant may only reserve the right to appeal the denial of a motion to suppress where the suppression would be dispositive of the case. It further held that "as a matter of law a confession may not be considered dispositive of the case." 376 So.2d at 385. Despite this language, we do not believe that the supreme court meant that the parties could not, with the approval of the court, stipulate to a finding that the suppression of a confession would be dispositive of the case.[1] Our sister court has just

[1]In *Brown* the court was concerned that any attempt to demonstrate that a confession was dispositive would result in a mini-trial of the case. Obviously, where there is a stipulation, such a result would not occur.

reached the same conclusion in *Jackson v. State*, No. NN 168 (Fla. 1st DCA Mar. 28, 1980). Accordingly, we will proceed to the merits of this appeal and examine appellant's argument that the trial court should have suppressed his confession because it came about as the result of an illegal stop and detention.

[2, 3] In order for a law enforcement officer to stop and detain a vehicle, the officer must have a well-founded suspicion of the presence of criminal activity. *E. g., McClure v. State*, 358 So.2d 1187 (Fla. 2d DCA 1978). As we recently noted in *State v. W.O.R.*, 382 So.2d 763 (Fla. 2d DCA 1980), a well-founded suspicion is " 'a suspicion which has some factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge.' " At 764. In the present case, the information available to Deputy Fennell did not give rise to a well-founded suspicion. Appellant's truck was proceeding lawfully along a public road and gave no indication of turning into the gate which provided the only access to the marijuana plane. Moreover, neither the fact that the truck had an out-of-county tag nor the fact that the topper's windows were blacked out was sufficient to indicate criminal activity. Hence, the stop and detention of appellant were illegal, and as a result, the confession which the officers obtained immediately thereafter was also tainted. *See Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *In re R.L.J.*, 336 So.2d 132 (Fla. 1st DCA 1976).

We reverse appellant's conviction and the denial of his motion to suppress.

HOBSON and CAMPBELL, JJ., concur.

Opposition

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CASE NO 81-423

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

STEVEN DONALD ALANDER,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to the Second District Court of Appeal
of Florida

BRIEF OF RESPONDENT ON JURISDICTION

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QUESTIONS PRESENTED

I

WHETHER SECTION 893.135, FLORIDA STATUTES IS UNCONSTITUTIONAL IN THAT IT IS VIOLATIVE OF THE CONSTITUTIONAL PROTECTIONS AFFORDED BY THE DUE PROCESS CLAUSE, THE EQUAL PROTECTION CLAUSE AND THE PROHIBITION AGAINST SELF-INCRIMINATION AND CRUEL AND UNUSUAL PUNISHMENT?

II

WHETHER THE STOP OF THE APPELLANT'S MOTOR VEHICLE WAS WITHOUT REASONABLE SUSPICION TO BELIEVE THAT A CRIME HAD BEEN, WAS BEING OR WAS ABOUT TO BE COMMITTED?

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PREFACE

The Petitioner, STEVEN DONALD ALANDER was the Appellant in the Second District Court of Appeal of Florida, and Defendant in the Florida trial court. The Respondent, The State of Florida, was the Appellee in the District Court and the prosecution in the trial court. In this brief, the parties will be referred to as they appeared in the Florida trial court below.

The following references is made in this brief:

(A) For the portions of the record below sufficient to show jurisdiction in this court, which are contained in the Appellant's Appendix and consist of pages A1-A45.

I

OPINIONS BELOW

The opinion of the Second District Court of Appeal of Florida is reported at Alander v. State, 402 So.2d 620 (Fla. 2d DCA 1981). There is no official reporter for citation to this opinion.

II

JURISDICTION

The Defendant has styled his brief herein as a "petition for certiorari." However, the jurisdiction of this Court should have been properly invoked as a direct appeal under the provisions of Title 28, United States Code, §1257(2) and Amendments IV, V, VI, VIII and XIV of the United States Constitution.

III

CONSTITUTION AND STATUTORY PROVISIONS

The Defendant's brief on his "Petition for Certiorari" accurately recites the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Section 893.135, Florida Statutes.

IV

STATEMENT OF THE CASE

The Defendant's facts as argued in his brief are incomplete and misleading. In addition to the facts presented by the Defendant numerous other facts were presented to the trial court and the Florida District Court of Appeal. Although a complete rendition of the facts is unnecessary to demonstrate the lack of a substantial federal question or the conflict with prior decisions urged by the Defendant the testimony from the suppression hearing does reflect that the stop of the Defendant's truck in the instant case occurred in an area of the Florida Everglades known as Big Cypress which is an unpopulated, isolated area with a total of four residences and unpaved roads. The deputies working the Collier County Sheriff's Department sub-section in the Everglades

had previously discovered a marijuana off-load site just three miles away at Turner River Road and U.S. 41. Approximately 10,000 very small marijuana plants were growing along the bank from dropped seeds. Due to the discovery of the off-load site, the deputies assigned to the sub-station had been watching the area for two weeks because they knew the logistics of the situation required large trucks to move the load out of the area. Up until February 25, 1980, the day of the stop in this case, no suspicious activity had occurred. However, on February 25, two deputies patrolling the area in separate vehicles observed several known marijuana smugglers in the area. In addition to these observations, Deputy Smallwood observed a large black truck, later identified as the truck driven by the Defendant proceeding back and forth through the area.

Smallwood was a resident of this area and had never seen trucks of this type in the area before. The big truck did not appear to be loaded by the way it was bouncing on the gravel road. Approximately one hour and a half later, the truck is observed by Deputy Sergeant Sanders. This time, however, Sanders observed the overload springs of the truck to be down to the rosters indicating quite a heavy load of cargo. Turner River Road is a rough gravel road and an unloaded truck with 75 or 80 pounds of air would bounce. This truck however was riding with the bumps. Based upon this additional information (as well as other observations which, for the sake of brevity are not included herein) Lieutenant Keene authorized Sanders to stop the truck as it headed toward State Road 84 (Alligator Alley), one of the only two exits from this area.

V

SUMMARY OF ARGUMENT

The present statute, Section 893.135, Florida Statutes is not unconstitutional, but rather is wholly consistent with recent decisions of this Court and traditional analysis.

The stop in the present case was lawful under the precise analysis of Terry v. Ohio, 392 U.S. 1 (1968) and United States v. Cortez, ___U.S.____, 101 S.Ct. 690 (1981).

VI

ARGUMENT

In his "Questions Presented" with regard to "Point I" the Defendant presents seven contentions of error designated "A" through "G". Of these, questions "C", "E" and "F" were not presented in the trial court and question "G" was not raised in the Florida District Court of Appeal. In contentions "A", "B" and "D" the Defendant claims that Section 893.135 violates the Fifth Amendment and the due process clause in that it compells testimony and is vague. The Defendants contentions should be rejected summarily.

A) NO SUBSTANTIAL FEDERAL QUESTION

Each of the Defendant's constitutional complaints are easily rejected based upon settled principles of federal constitutional analysis. In Roberts v. United

___U.S.___, 100 S.Ct. 1358 (1980) the defendant, a heroin dealer, refused to cooperate with police in the further investigation of narcotics traffic in his community. 100 S.Ct. at 1362. The trial court therefore meted out a mere severe sentence than if the defendant had cooperated. Id. In sustaining the more severe sentence the Roberts court held 1) that part of the defendants rehabilitation would be cooperation with law enforcement in exposing crime in his community and 2) that there was no record basis for any claim of self-incrimination or coercion. 100 S.Ct. at 1363-1365. As in Roberts, in the case at bar there is not a shred of evidence that the Defendant had been compelled or coerced to do anything. Indeed, under settled principles of constitutional analysis, to infringe upon the Fifth Amendment prohibition, the

testimony must be both compelled and used against the defendant. See, Lefkowitz v. Cunningham, 431 U.S. 801, at 804-805 (1977). Without use against the defendant, there is no prohibition under the Fifth Amendment. See, United States v. ManDujano, 340 U.S. 367 (1951). Furthermore, the central issue under the Fifth Amendment is not whether the Defendant has a difficult choice but whether he has a choice. See, McGautha v. California, 402 U.S. 183, at 212-213 (1971); North Carolina v. Alford, 400 U.S. 25 (1970); Brady v. United States, 397 U.S. 742 (1970). The present statute presents the Defendant only with a difficult choice and is therefore not in violation of any constitutional precepts.

The Defendant's claims that Section 893.135 denys due process and imposes cruel and unusual punishment and violates the Sixth Amendment are similarly wholly without merit. In Bordenkircher v. Hayes,

434 U.S. 357 (1978) the prosecutor in pre-trial plea bargaining had told the Defendant, the Defendant's plea to a term of five years in prison would be acceptable, but that if the Defendant did not plead guilty, that he, the prosecutor, would seek a grand jury indictment against the Defendant as an habitual offender, which required a mandatory life sentence. 434 U.S. at 359. The Defendant in Bordenkircher chose not to plead guilty and was subsequently convicted and sentenced to life. Id. at 360. In framing the issue, the Bordenkircher court specifically held that:

> "As a practical matter, in short, this case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain." [Emphasis added].
>
> Id.

Addressing the principles which are also clearly controlling herein, the court further opined that:

> "By hypothesis, [a] plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after trial. See ABA Standards Relating to Pleas of Guilty §3.1 (1968); Note, Plea Bargaining and the Transformation of the Criminal Process, 90 Harv.L.Rev. 564 (1977), Cf. Brady v. United States, supra, 397 U.S., at 751, 90 S.Ct., at 1470; North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162.
>
> While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion to his trial rights, the imposition of these difficult choices [is] an inevitable--and permissible --attribute of any legitimate system which tolerates and encourages the negotiation of pleas." [Emphasis added].

Id., at 364.

Relying upon its decision in Bordenkircher, in Corbitt v. New Jersey, ___U.S. ___, 99 S.Ct. 492 (1978), the court also found no constitutional disability in circumstances analogous to those possible under the statute in the case at bar. In Corbitt through a complex New Jersey system of homicide statutes, if the defendant went to trial and was convicted of first degree murder the trial judge must sentence him to life imprisonment. 99 S.Ct. at 495. If the defendant pleaded nolo contendere to the trial court and the trial court accepts his plea he could be sentenced to a sentence of "not more than 30 years" or life in the complete discretion of the trial court. 99 S.Ct. at 495-497. The Corbitt defendant chose to go to trial and was convicted of a first degree murder offense and sentenced to the mandatory life term under the statute. 99 S.Ct. at

495-496. In rejecting the defendant's multiple constitutional claims under the Fifth, Sixth and Fourteenth Amendments, the Corbitt court held that:

> "As did the New Jersey Supreme Court, we disagree. The cases in this Court since Jackson have clearly established that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid. Specifically, there is no per se rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea. The plea may obtain for the defendant not only "the possibility or certainty. . . [of] a lesser penalty than the sentence that could be imposed, after a trial and a verdict of guilty. . .," Brady v. United States, 397 U.S. 742, 751, 90 S.Ct. 1463 1470, 25 L.Ed.2d 747 (1970), but also of a lesser penalty than that required to be imposed after a guilty verdict by a jury."

The Corbitt court concluded its analysis, relying upon Bordenkircher, thus:

> "While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'--and permissible--' attribute of any legitimate system which tolerates and encourages the negotiation of pleas."Chaffin v. Stynchcombe, supra, at 31 (93 S.Ct. 1977). It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutional legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty. 434 U.S., at 364, 98 S.Ct., at 668."

99 S.Ct. at 498.

In the case at bar, after his conviction, sentence and appeal, the Defendant has two choices under the statute. He may either serve the lawful term of his

imprisonment or he may seek the benefit of mitigation of his sentence by substantial cooperation with law enforcement. Under Corbitt, Bordenkircher and Brady and its progeny, there is simply no constitutional disability in merely providing a Defendant with the choice of "grim alternatives" upon his conviction for trafficking in narcotics in Florida.

Trafficking in narcotics is a heinous crime, which is tearing at the very fabric of our society. Clearly the legislative purpose in providing more severe penalties for such a crime has a rational and even landable basis and therefore is manifesting devoid of any defect under any equal protection claim. See, analysis in, Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); Marshall v. United States, 414 U.S. 417, at 421-422 (1974); see also, Abernaz v. United States,

___U.S.___, 101 S.Ct. 1137 (1981). Additionally, the severity of the penalties in Section 893.135 also cannot be seriously assailed under any theory under the Eighth Amendment. See, Rummel v. Estelle, _____ U.S.___, 100 S.Ct. 1133 (1980). The extent and nature of crimes and their punishment is an exclusive legislative perogative into which no court should intrude. Id.

B) THE STOP WAS CONSTITUTIONAL

The facts of this case present the "Florida marijuana smuggling" equivalent to the issue addressed in this Court's recent decision of United States v. Cortez, ___U.S.___, 101 S.Ct. 690 (1981) involving the transporting of illegal aliens across the Mexican border. Contrary to petitioner's assertions, the decisions of Brown v. Texas, 443 U.S. 47 (1979); United States v. Brignoni-Ponce, 422 U.S.

873 (1975); and Delaware v. Prouse, 440 U.S. 648 (1979) are not adversely implicated by the decision below. On the contrary, the facts presented at the hearing on the motion to suppress in this case demonstrate alert police work grounded upon objective facts and circumstances which gave rise to a reasonable suspicion.

Petitioner's reliance upon Brown v. Texas, supra; United States v. Brignoni-Ponce, supra; and Delaware v. Prouse, supra, is misplaced. This is not a case as in Brown where the petitioner was merely in a neighborhood frequented by drug users. This is not a case as in Brignoni-Ponce where the only justification for the stop was the apparent ancestory of the defendants. Respondent does not know why Delaware v. Prouse is relied upon for "conflict" by petitioner.

The facts of this case break no new ground in the area of "stop and frisk." The standard utilized below was the same as that announced by this Court in Terry v. Ohio, 392 U.S. 1 (1968) as codified in Florida law as Section 901.151 Fla.Stat. (1979). Although not in conflict with the facts of this case, the decision in United States v. Brignoni-Ponce, supra, does give guidance through the factors this Court found pertinent in the determination of a reasonable suspicion. Those factors include the unusual patterns of traffic on a particular road; information about recent illegal activity in the area; the driver's behavior, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion; aspects of the vehicle itself; and, the appearance of the vehicle as being heavily loaded. 422 U.S. at 884-885. As the Court concluded; "In

all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling." 422 U.S. at 885. Sergeant Sanders had fifteen (15) years experience as a deputy in this area and twenty (20) large marijuana operations to his credit. See e.g. State v. Lopez, 369 So.2d 623 (Fla. 2d DCA 1979), cert. den. 383 So.2d 1198 (Fla. 1980).

Petitioner has failed to demonstrate a substantial federal question requiring the exercise of jurisdiction by this Court.

Since petitioner challenges the search only on the basis of an allegedly unlawful stop, respondent will rely upon the above argument in support of the lawful search.

WHEREFORE, upon the foregoing, the Appellee, THE STATE OF FLORIDA, prays that this Honorable Court will enter its order affirming the judgment below and/or denying certiorari.

RESPECTFULLY SUBMITTED, on this____ day of December, 1981, at Miami, Dade County, Florida.

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